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Supreme Court of the United States

OCTOBER TERM, 1986

CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA, STATE COURT RECEIVER FOR FAR WEST ADMINISTRATORS, INC., CONTINENTAL ORGANIZATION OF MEDICAL, PROFESSIONAL AND TECHNICAL EMPLOYEES, AND FINCOMP INSURANCE MARKETING, INC.,

Petitioner,

vs.

KENNESAW LIFE AND ACCIDENT INSURANCE COMPANY, a Georgia corporation,

Respondent.

ON PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioner has simply gone too far to honor the adage that the only way to obtain review by this Court is to "make their hearts bleed." It suggests that the Respondent has somehow obtained a $200,000 "windfall" as a result of the Eleventh Circuit's ruling. Nothing could be further from the truth. Throughout this litigation, all parties have agreed that even if Respondent were to prevail in this action, there still would remain thousands of dollars in sums due to Respondent as a result of its relationship with Petitioner's predecessors-in-interest.

The purported $200,000 "windfall" is a gross mischaracterization by Petitioner, based on (1) an elaborate, complex, and ultimately unnecessary dollar-for-dollar tracing burden which Respondent undertook at trial; and (2) Petitioner's apparently deliberate distortion of the facts adjudicated below.

Despite the enormous loss experienced by Respondent in dealing with Petitioner's predecessors-in-interest, and the fact that this loss will now never be compensated, it is undisputed that Respondent has honored every single valid claim submitted by the individual employees who were entitled to insurance coverage under the policies issued by Respondent.

The actual injustice arising out of this interpleader action is the fact that Respondent has been forced to expend tens of thousands of dollars in legal fees to prove its right to the premium account involved in this particular litigation. Fortunately, the Eleventh Circuit Court of Appeals realized that Respondent had adequately proven its ownership of this account in the District Court. In reaching this result, the Eleventh Circuit's opinion shows that the District Court erred in failing to adequately apply the facts to the relevant Georgia law; and, in the one instance where it did overturn a factual finding of the District Court, the Eleventh Circuit

explained why such a finding was clearly erroneous and implausible on its face. There is therefore no reason for further review of the Eleventh Circuit's opinion.

STATEMENT OF THE CASE

This is an interpleader case commenced by the National Bank of Georgia ("NBG") as a result of conflicting claims of ownership made against a NBG account. The funds in the account were claimed by Respondent Kennesaw Life and Accident Insurance Company ("Kennesaw Life") and by Petitioner Credit Managers Association of Southern California ("CMA").

The case arises out of insurance coverage issued by Kennesaw Life to the C.O.M.P.E.T.E. Master Trust ("C.O.M.P.E.T.E."), a multiple employer trust which was designed to provide health insurance benefits to the employees of its employer members. Kennesaw Life contracted with C.O.M.P.E.T.E., and entered into a separate relationship with a third party administrator, Far West Administrators, Inc. ("Far West") pursuant to a written Administrative Services Agreement. That Agreement essentially provided that Far West would perform administrative services for Kennesaw Life with respect to insurance policies issued by Kennesaw Life to C.O.M.P.E.T.E. The premiums due Kennesaw Life from the C.O.M.P.E.T.E. program were to be collected pursuant to an Annex "A" to the Administrative Services Agreement which also provided for a transfer of premiums collected on behalf of Kennesaw Life from C.O.M.P.E.T.E.:

> [S]o that the approximate amount of net premiums due [Kennesaw Life] may be forwarded weekly to the National Bank of Georgia, where such net

> premium payments shall be deposited in a separate account established by [C.O.M.P.E.T.E. Master Trust] in trust for [Kennesaw Life] (hereinafter referred to as the "Holding Account").

The arrangement established by Annex "A" was basically followed by Kennesaw Life, C.O.M.P.E.T.E. and Far West. Gross amounts collected from employers were received in a California lock box account. Amounts due to Kennesaw Life for its premiums were then transferred to another California bank account in the name of C.O.M.P.E.T.E. From there, funds which represented the net premiums due to Kennesaw Life were transferred to the NBG account which is the subject of this interpleader action.

Certainly, from the point of view of C.O.M.P.E.T.E. and its beneficiaries, the arrangement was followed in that Kennesaw Life paid some $3.2 million in claims to the time of the District Court action even though it received only roughly $2 million in premiums. There is no dispute but that Kennesaw Life is entitled to premiums in that sum. Kennesaw Life continues to this day to pay claims. Even if Kennesaw Life is successful in this case, it will still lose at least $4 million as a result of its dealings with C.O.M.P.E.T.E.

Nor is there much in dispute about the nature of the NBG account. Neither Far West nor C.O.M.P.E.T.E. exercised any incident of ownership in the NBG account; Kennesaw Life exercised all of the incidents of ownership. Kennesaw Life personnel assisted in the opening of the account, planned with bank personnel the appropriate investment of the funds in the account, received bank statements relating to the account and received notification by the bank when funds were received in the account.

Sizeable amounts of money (five or six figures) were transferred out of the account on the *oral direction* of Kennesaw Life personnel to cover the payment of insurance claims on policies issued by Kennesaw Life to C.O.M.P.E.T.E. On several occasions, Kennesaw Life deposited checks which it had received in direct payment for *other premiums* due in the NBG account. The NBG officer with responsibility for the account testified that the bank thought of Kennesaw Life as the customer and looked to it for direction. Investment income from the entirety of the account was credited to Kennesaw Life and used for its purposes. The out-of-context citations from the trial transcript by CMA do not contradict any of this.

A non-jury trial was held before Judge Richard C. Freeman in the United States District Court for the Northern District of Georgia, Atlanta Division, on April 29, 1985 through May 2, 1985. On May 28, 1985 the Court filed its opinion (attached as Exhibit B to the Petition for Writ of Certiorari) holding that CMA was entitled to the funds in the account. The Eleventh Circuit then reversed the District Court's judgment in an opinion filed October 7, 1986 (attached as Exhibit A to the Petition for Writ of Certiorari).

REASONS FOR DENYING THE WRIT

1. THE "CLEARLY ERRONEOUS" STANDARD OF RULE 52(a) DOES NOT APPLY BECAUSE THE ELEVENTH CIRCUIT BASED ITS REVERSAL ON THE DISTRCT COURT'S FAILURE TO PROPERLY APPLY THE FACTS TO THE LAW.

The Eleventh Circuit's opinion is very clear: it reversed the District Court, and ruled in favor of Kennesaw Life, on the ground that Kennesaw Life had succeeded in establishing "its legal ownership of the account." (Pg. A-8.) In so holding, the Eleventh Circuit started by acknowledging the applicable principles of Georgia law, i.e., that the name or title of the bank account creates only a *rebuttable presumption* of ownership in the titleholder. (Pg. A-8.) The Eleventh Circuit then stated that:

> *The lower court in this case acknowledged these principles in its opinion, but then failed to apply them to the evidence presented.* Instead, the district court looked to the title of the account and considered whether the creation of the "COMPETE Master Trust" account was more consistent with the provisions of the Declaration of Trust or with Kennesaw Life's Services Agreement with Far West. Since the Services Agreement required a "holding account" rather than a trust account, [footnote omitted] the court awarded ownership to COMPETE and its receiver.

> We concede that this method of analysis greatly simplifies the matter of ownership, an issue complicated by the existence of several interrelated parties, vague agreements creating dual loyalties, and esoteric insurance practices. Nonetheless, *such a narrow approach is clearly inconsistent with the breadth of inquiry required by Georgia law.*

(Pg. A-9 (emphasis added).)

The Eleventh Circuit's reversal was expressly based on the District Court's failure to review the facts "with the breadth of inquiry" required under Georgia law in this situation.[1] More specifically, the Eleventh Circuit held that Kennesaw Life had made a factual showing in the District Court which was sufficient to rebut the presumption of ownership which C.O.M.P.E.T.E. enjoyed as titleholder.

The "clearly erroneous" standard of Rule 52(a) does *not* apply where the lower court's error was one of misapplication of the facts to the law. This Court made that clear in its recent opinion in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. ___ , 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739, 744-45, (1986):

> If it [the Court of Appeals] was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a) it could have set them aside on that basis. *If it believed that the District Court's factual findings were unassailable, but that the proper rule of law*

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[1] Kennesaw Life notes that the Eleventh Circuit did reject one factual finding made by the District Court. As discussed in the following section, that finding by the District Court was implausible and "clearly erroneous" under Rule 52.

> *was misapplied to those findings, it could have reversed the District Court's judgment.* (Emphasis added.)

The Eleventh Circuit's opinion shows that it believed the District Court had misapplied the facts in determining whether Kennesaw Life had established its legal ownership of the account. The Eleventh Circuit was therefore free to reverse, as explained in *Icicle Seafoods*, without reference to the "clearly erroneous" standard of Rule 52(a).

The question ruled upon by the Eleventh Circuit — which party is the "legal owner" of the account — is not a question of fact under Rule 52(a). Whether it can be viewed as a question of law, or a mixed question of law and fact, is beside the point, as Judge Friendly recognized in *In Re Hygrade Envelope Corp.*, 366 F.2d 584, 588 (2nd Cir. 1966), stating:

> Whether application of a legal standard to facts that are undisputed or have been found without clear error is a question of law or of fact is, as we said in *Ellerman Lines, Ltd. v. The SS President Harding*, 288 F.2d 288, 292 (2 Cir. 1961), "[a]n area over which 'law' and 'fact' have battled for a century." [Citation omitted] Perhaps clarity of thought would be promoted by recognizing that it is not exactly one or the other. Jural concepts are not limited to binary systems. The scope of review might be better understood by recognizing that the imperatives of F.R.Civ.P. 52(a) and its analogues are avoided whenever the issue is not one of "fact"; there is no necessity for going further and endeavoring to establish that it is one of "law" in the usual meaning of that term. . . . To be sure, an appellate court must respect findings of the trial

> judge as to what in fact happened and in addition should give due weight to his superior opportunity to acquire the true feel of the case [citation omitted]. But when the issue is his application of a legal standard to facts undisputed or reasonably found, reversal is not limited to results that are 'clearly erroneous'; *it is enough that the appellate court should be convinced, as we are here, that the result does not jibe with the applicable rule of law.* [Footnote omitted]. (Emphasis added.)

It is unmistakable from the Eleventh Circuit's opinion that it felt the District Court's ruling did not jibe with the applicable Georgia law. The opinion states as much in no uncertain terms.

2. THE ELEVENTH CIRCUIT'S REVERSAL OF ONE FACTUAL FINDING BY THE DISTRICT COURT MEETS THE STANDARD OF RULE 52(a).

The Petition for Writ of Certiorari subtly and artfully distorts the opinion of the Eleventh Circuit in an attempt to convince this Court that the Eleventh Circuit overturned a number of factual findings made by the District Court.[2] As is evident from the text of the Eleventh Circuit's opinion, such is not the case — the only factual finding overturned by the Eleventh Circuit was one portion of the District Court's Finding of Fact No. 9. (Pg. A-11.) Otherwise, the Eleventh Circuit based its reversal largely on the District

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[2] Specifically, the Petitition suggests that Findings of Fact Nos. 9-11 were rejected by the Eleventh Circuit. (Petition for Writ of Certiorari, pgs. 8-9.)

Court's disregard of evidence which was highly probative in determining legal ownership of the account under Georgia law. (Pg. A-12.)

The only factual finding rejected by the Eleventh Circuit was the District Court's conclusion in Finding of Fact No. 9 that the subject bank account "was intended to receive premium funds from CMT for the ultimate purpose of paying administrative expenses and benefits to insured employees."

Admittedly, the determination of the parties' purpose in establishing the account was central to the outcome of this dispute. But, in finding that the purpose of the account was to pay premiums to Kennesaw Life — and thereby rejecting the District Court's finding — the Eleventh Circuit complied with the "clearly erroneous" standard of Rule 52(a). As this Court noted in *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985), " '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)."

It is evident from its opinion that the Eleventh Circuit had a firm conviction that the District Court erred in determining the purpose of the account. This Court held in *Anderson* that an appellate court may reject even a trial court's finding based upon credibility of witnesses if the evidence was "so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." (*Anderson*, 470 U.S. at 575.)

The Eleventh Circuit found that the evidence relied upon by the District Court was strikingly inconsistent and

implausible on its face. The District Court was simply wrong in finding that the purpose of the account was something other than to pay premiums to Kennesaw Life. The Eleventh Circuit stated at page A-11:

> In light of this evidence, the district court was clearly erroneous in finding the following facts. First, the court erred in describing the purposes of this account as 'paying administrative expenses and benefits' to COMPETE participants. The evidence clearly shows that the account was created to pay premiums due to Kennesaw Life. No administrative expenses were ever paid from this account since all expenses were deducted by Far West before funds were transmitted to NBG. The fact that benefits were paid from this account is merely a reflection of the fact that all insurance benefits ultimately derive from premiums paid and the investment income accrued thereon. There is no question that Kennesaw Life has paid all benefits owed under its policy and that these benefits exceeded the amount in the account.[7]
>
> [Footnote 7]: The district court's conclusion might have been more plausible if the account at NBG were COMPETE's only account or if COMPETE had beneficiaries located in Georgia [where Kennesaw Life and NBG are located]. The record indicates that virtually all beneficiaries resided in the western United States and that COMPETE maintained several accounts in California for the purpose of paying benefits. COMPETE's only ties to Georgia were its policies with Kennesaw Life, which required remittance of premiums and thus a bank account in this state.

As noted in the above passage, C.O.M.P.E.T.E. operated almost entirely in the State of California, and apparently had no beneficiaries in the State of Georgia. It had a number of bank accounts in California. Its only tie with the State of Georgia was the fact that Kennesaw Life was located there. In view of these facts, and the facts surrounding Kennesaw Life's virtually unfettered use of the account, it is obvious that the only plausible purpose for the account was to pay premiums to Kennesaw Life. The District Court's finding to the contrary was therefore clearly erroneous, and the Eleventh Circuit properly recognized that fact. There is thus no cause for review of the Eleventh Circuit's opinion.

3. THE ELEVENTH CIRCUIT PROPERLY APPLIED GEORGIA LAW.

A. TRACING IS NOT REQUIRED UNDER GEORGIA LAW ONCE OWNERSHIP OF THE ACCOUNT WAS ESTABLISHED.

CMA ignores relevant Georgia law in arguing that tracing was required in this case. The Eleventh Circuit's opinion cites at page A-9 the case of *Granade v. Augusta Fire Department Credit Union*, 118 Ga. App. 157, 162 S.E.2d 870 (1968). That case establishes that under Georgia law a party who is not the titleholder can establish legal ownership of an account without reference to any tracing requirement. The *Granade* opinion stated:

> "Ordinarily, where a deposit is made by one person into the name of another, the rights with respect to such deposit belong to the person in whose name the deposit is made, even though the

> latter is unaware of the deposit, and the bank may not dispute his title or rights. However, the credit given on the bank's books is only prima facie evidence of the rights of the person to whom the deposit was credited; and, generally speaking, *money deposited to the credit of one person may be shown by the circumstances to belong to another.* Persons having title to funds are not divested thereof by another's deposit of the money in a bank having notice of the true ownership of the funds, and it has been held that a deposit may be made in the name of a person other than the depositor and yet remain the property of the depositor, so that the bank is justified in recognizing his ownership, where the circumstances are such that the deposit has not been put beyond his control." 9 CJS 597-598 § 287. See also, Bank of Ogelthorpe v. Brooks, 33 Ga. App. 84 (125 S.E. 600).

Granade, 162 S.E.2d at 871-72 (emphasis added).

Each of the Georgia cases relied upon by CMA to support its tracing theory involves situations where the trustee or holder of a fund has commingled or otherwise expended funds properly due to the beneficiary; in those cases it appears that under Georgia law the beneficiary may have the obligation to trace his funds to establish that the remaining assets actually belong to him. (*See, e.g., Parker v. Harling*, 200 S.E. 800, 802 (Ga. 1939).) In the present case, however, the Eleventh Circuit properly determined that there was no need to trace the full origin of the NBG account. The court reached this result after finding that Kennesaw Life had been the only owner of that account from its inception, as shown by the purpose of the account,

which was to pay *premiums to Kennesaw Life.* (Pgs. A-12, 13.) Accordingly, CMA's contention that tracing was required under Georgia law is incorrect.

B. TRACING WAS IRRELEVANT BECAUSE OF THE RELATIONSHIP OF THE PARTIES.

CMA contends that Kennesaw Life could not be entitled to the account unless it traced every dollar directly from its source (the individual employer members of C.O.M.P.E.T.E.) through the hands of C.O.M.P.E.T.E., Far West, and into the NBG account; CMA contends that Kennesaw Life had the obligation to prove that every dollar which ultimately ended up in the NBG account had, during every step in the process, been segregated and identified as Kennesaw Life premium. CMA goes on to assert that these premiums became "commingled" — and "dissipated" — at the C.O.M.P.E.T.E. level.

The problem with CMA's analysis is that the employer members of C.O.M.P.E.T.E. were *not* Kennesaw Life's policyholders. The employer members of C.O.M.P.E.T.E. and their employees were, at most, certificate holders. The policyholder, which alone had the obligation to pay premiums, was C.O.M.P.E.T.E. itself. The funds the employer members of C.O.M.P.E.T.E. paid to C.O.M.P.E.T.E. were not Kennesaw Life premiums; C.O.M.P.E.T.E.'s funds became Kennesaw Life premiums only when the contracting party, C.O.M.P.E.T.E. itself, paid the premiums to Kennesaw Life.

C.O.M.P.E.T.E., either independently or via Far West, made those premium payments by transferring funds to the NBG account. There is no doubt that by the time the funds

got to NBG in Georgia whatever "commingling" might have occurred in California was irrelevant. That is because the funds transmitted to Georgia cannot be understood other than as premium funds owed by C.O.M.P.E.T.E. to Kennesaw Life, whether paid late or not.

C. THERE IS NO $200,000 "WINDFALL".

In an attempt to sway this Court, CMA insinuates that Kennesaw Life will receive $200,000 more than it is owed should the Eleventh Circuit's opinion stand. That is simply false. The Court will note that any reference to such a windfall is wholly absent in the appellate record in this matter. CMA well knows that Kennesaw Life will lose literally millions of dollars as a result of its insurance business with C.O.M.P.E.T.E. As receiver for the C.O.M.P.E.T.E. program, CMA also knows that their principal creditor is none other than Kennesaw Life and that this so-called $200,000 "windfall" has nothing to do with this case. As Finding of Fact No. 44 indicates, the $200,000 figure relates to a California-located "collection account", not the NBG account at issue in this lawsuit.

What does the trial record actually show about this alleged $200,000 "windfall"? The issue was briefly raised at trial during the examination of Michael Kruger, Kennesaw Life's President. His testimony indicated that seven checks totalling $200,000 were deposited into a "collection account" by a Far West related-entity called Professional Administration Group, Inc. Mr. Kruger had no knowledge as to what happened to these funds. (1SR-2-52, 53, 60, 61.) Finding of Fact No. 44 so indicates. Some portion of these funds may eventually have been sent to the NBG account as premiums; they may also have been used by one or more of the Far West-related entities for their own purposes.

The record is simply devoid of any evidence, much less proof, of what became of these funds; there is *no* evidence at all that Kennesaw Life ever received them. CMA itself did not refer to these sums in its flow charts of funds going to Kennesaw Life introduced as evidence at trial. Nor did it raise this issue in its Eleventh Circuit brief. Kennesaw Life's best guess at this point is that the $200,000 "windfall" actually constitutes a transfer between California accounts controlled by the entities CMA itself represents. Certainly there is no evidence of any "windfall" received by Kennesaw Life.

4. THE FUNDS IN THE ACCOUNT BELONGED TO KENNESAW LIFE AS A MATTER OF LAW. THUS, THE ELEVENTH CIRCUIT REACHED THE PROPER RESULT.

It is well settled that points urged upon but not reached by a Circuit Court of Appeals may be urged in the Supreme Court in support of the judgment of the Circuit Court of Appeals. *United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882, 88 L.Ed. 1148 (1944).

Kennesaw Life filed a supplemental reply brief in the Eleventh Circuit urging that, under the California Insurance Code statutes applicable to C.O.M.P.E.T.E. and Far West, the NBG account was a fiduciary trust account for the payment of premiums, and was therefore the property of Kennesaw Life regardless of any purported responsibility to "trace" the funds in the account. The Eleventh Circuit apparently felt there was no need to reach this issue, since Kennesaw Life had proven its legal ownership to the fund irrespective of California law. Kennesaw Life nevertheless sets forth its contention as an

alternative ground for upholding the Eleventh Circuit's decision.

C.O.M.P.E.T.E.'s and Kennesaw Life's administrator for the collection and delivery of the premium funds was Far West, a California producer subject to California law. Since the funds were placed in the NBG account by Far West, they are indisputably Kennesaw Life trust funds. California law impresses a trust on funds handled by a producer when they are segmented as Far West did when it took them out of its California accounts and placed them in the NBG account.

California Insurance Code §1733[3] requires insurance premiums to be held in trust and segmented from other types of funds. Premiums are designated fiduciary funds, and as such may be remitted only to the "insurer". California Insurance Code §1734. It is undisputed that the NBG account contained premium funds paid by C.O.M.P.E.T.E., the insured, to compensate Kennesaw Life, the insurer, for the obligations assumed under two insurance contracts. CMA itself concedes Kennesaw Life had access to the account for purposes of collection of premiums and paying claims. The funds cannot therefore be considered "assets" of C.O.M.P.E.T.E., which are the only funds any statutory successor or receiver such as CMA is entitled to recover under California Insurance Code §1037. Clearly, §1733 and §1734 establish that the premium funds in the account are held in trust for Kennesaw Life, and as such may only be remitted to Kennesaw Life in accordance with §1734. To give them back to C.O.M.P.E.T.E. would give C.O.M.P.E.T.E. not only legitimate assets — the

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[3] Unless otherwise indicated, section references are to the California Insurance Code.

insurance Kennesaw Life willingly provides to this day — but also the compensation paid out for that insurance. Such "double-dipping" is not allowed.

On May 19, 1981, California Insurance Commissioner Robert Quinn issued Bulletin No. 81-2. The purpose of this Bulletin was to inform licensed insurance producers of their fiduciary obligations with respect to handling premiums. As explained in the Bulletin, the phrase "in a fiduciary capacity" as used in §1733 means an insurance producer holds premiums as a trustee and not as the owner of such funds. All the trust funds are required to be segregated from the producer's own funds. The Bulletin also prohibits a producer from treating fiduciary funds as a personal asset or income or from using fiduciary funds to collateralize a loan.

Section 1734 establishes certain requirements pertaining to the holding of fiduciary funds. Under that section, a producer has two options in the handling of trust funds:

1. Remit the premium less commission to the insurer within fifteen days after receipt by the producer; or

2. Maintain such premium in a trustee bank account with other trust funds. As stated above, even certain non-trust funds can be commingled with the premiums. If the producer desires to open a trust account, Bulletin 81-2 suggests that the account bear the following notation: "This is an insurance trust or *custodial account* maintained under the provisions of California Insurance Code Sections 1733, 1734 or 1734.5." (Emphasis added.) With written authorization from an appointing insurer, an insurance agent may also invest fiduciary funds held for such insurer in certain interest-bearing accounts or securities to obtain the interest.

In this case, the Bulletin 81-2 custodial account was labelled a custodial account by all parties. All parties seem

to concede it contained *only* funds transmitted out of C.O.M.P.E.T.E. and intended for Kennesaw Life; certainly all parties concede the amounts transmitted correlate roughly to the amounts of premium owed, and there is no other obvious explanation for their transmission.

The main question, according to CMA, is whether the NBG account can be traced back, dollar-for-dollar, to each Kennesaw Life certificate holder. That analysis, however, was wholly irrelevant to the question before the lower courts; they essentially had no alternative but to find the NBG account a fiduciary trust account generally complying with California law. Whether the NBG account can also be characterized as the custodial trustee account provided for in the Restatement of Trust, as CMA has consistently argued, has no bearing on the outcome. The point is that it was intended — and was used — as a premium account for payments by C.O.M.P.E.T.E. to Kennesaw Life, and this is all Kennesaw Life must prove. As a matter of law, the funds belong to Kennesaw Life.

CONCLUSION

CMA's attempt to persuade this Court that the Eleventh Circuit reversed a number of factual findings made by the District Court fails once one simply takes the time to read the Eleventh Circuit's opinion. That opinion makes it clear that the Eleventh Circuit found the District Court had failed to properly apply the facts to the applicable law. Under Georgia law, it was clear that Kennesaw Life had effectively rebutted the presumption of ownership which C.O.M.P.E.T.E. enjoyed as a titleholder to the account.

The one factual finding which was reversed by the Eleventh Circuit was "clearly erroneous" on its face. The

Eleventh Circuit explained why the District Court's finding regarding the purpose of the account was simply implausible. Even Petitioner concedes the NBG account was used to pay premiums to Kennesaw Life, and the record is devoid of any evidence of any other use. Thus, the one factual determination made by the Eleventh Circuit meets the standard of Rule 52(a).

Finally, the Eleventh Circuit did not reach another independent ground upon which Kennesaw Life was entitled to prevail as a matter of law. Under the California Insurance Code statutes applicable to the premium transfers in this situation, the only possible designation for the account was that it existed as a trust fund for the payment of Kennesaw Life premiums.

For the reasons stated above, Kennesaw Life respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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